Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MAINE,
Petitioner

V.

MICHAEL A. PATTEN,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICAL COURT OF THE
STATE OF MAINE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE AUTOMOBILE EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT PERMITTED THE WARRANTLESS SEARCH OF THE BROWN PAPER BAG FOUND IN THE RESPONDENT'S AUTOMOBILE IN THE COURSE OF THE LAWFUL, WARRANTLESS SEARCH OF THE VEHICLE ITSELF.

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OPINION BELOW

The memorandum opinion of the Supreme Judicial Court of Maine in State of Maine v. Michael A. Patten, Decision No. 2764 (Decided October 30, 1981), denying the State's appeal from a Maine Superior Court order suppressing marijuana seized by the State without a warrant, is unreported and appears as Appendix A to this Petition.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Michael A. Patten, Decision No. 2764 (Decided October 30, 1981), was entered on October 30, 1981, and the Court's mandate was issued on the same day. Petitioner has timely filed this petition for a writ of certiorari within the sixty-day filing period set forth in U.S.Sup.Ct. Rule 20.1.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C.A. §1257(3).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the basis of circumstances occurring on November 28, 1979, which corroborated a reliable informant's tip from the preceding evening that Respondent Michael A. Patten would be transporting marijuana in an automobile on November 28th, officers of the Sheriff's Department of Aroostook County, State of Maine, followed, detained, and searched Respondent's automobile without a warrant on that date. In the course of

this search, Deputies Carl McHatten and Hugh Turner discovered a closed brown paper bag lying on the back seat, opened and warrantlessly searched the bag, and found marijuana inside. On March 17, 1980, Respondent filed a motion in Maine Superior Court to suppress the marijuana as evidence against him in any criminal proceeding. On September 18, 1980, Petitioner and Respondent filed an Agreed Statement of Facts, included as Appendix B to this Petition, relative to Respondent's motion to suppress.

To assist resolution of the suppression issue, the Superior Court Justice requested Petitioner and Respondent to file supplemental memoranda of law addressed to the following issue:

> Assuming probable cause to search the defendant's car for marijuana, whether the search of the paper bag contained within the passenger compartment of the car was unreasonable.

In Petitioner's "Supplemental Memorandum of Law," Petitioner contended that the search

of the brown paper bag was reasonable under the Fourth Amendment to the United States Constitution and distinguishable from the searches in Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), United States v. Chadwick, 433 U.S. 1, 97 S.Ct.2476, 53 L.Ed.2d 538 (1977), State v. Blais, Me., 416 A.2d 1253 (1980), and State v. Hassapelis, Me., 404 A.2d 232 (1979), which last two decisions were no more than state court applications of the federal law announced in Sanders and Chadwick. Petitioner stated:

> in neither Chadwick nor Sanders did the United States Supreme Court have before it the issue presented in this case, whether exigent circumstances exist to search a container during and incident to a motor vehicle search. The facts in both Chadwick and Sanders demonstrate that the Court was addressing issues of searches of personal property independent of the need to search anywhere else. In both

> cases, police had isolated the particular container that would be holding the marijuana, if it were present at all.
>
> The facts of the instant case are unquestionably not the same. At the time that the deputy opened the top of the rolled-over paper bag, a search of the defendant's vehicle was at that time still ongoing. Police had not isolated a container that would be holding the marijuana, if it were to be present at all. To have not opened the bag at that time would have necessitated seizing the bag, but holding it unopened, while a thorough search of the vehicle and immobilization of other containers continued.

The Superior Court Justice rejected Petitioner's argument. (The Superior Court Justice's "Findings and Order" are included as Appendix C to this Petition.) Noting at the outset that the issue was one of federal law, the Superior Court Justice found exigent circumstances, under the "automobile exception" rule to the Fourth Amendment warrant requirement, excusing the State from securing a warrant to seize and search Respondent's

automobile and to seize the brown paper bag discovered inside the vehicle. However, citing State v. Blais, supra, which in turn cited State v. Hassapelis, supra, Sanders, and Chadwick, the Justice ruled that the search of the paper bag was not permitted under the "automobile exception" and that the marijuana found in the bag must therefore be suppressed.

On appeal to the Supreme Judicial Court of Maine, Petitioner contended

> that the warrantless search of the brown paper bag in the instant case, conducted pursuant to a valid warrantless search of the Defendant's automobile, was in the context of those exigent circumstances which fall within the "automobile exception" rule to the Fourth Amendment's warrant requirement, as enunciated in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), and Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). Hence, the first issue raised by the State on appeal is whether there were exigent circumstances, in light of Carroll and Chambers,

> excusing the State from securing a warrant to search the brown paper bag.

In light of the United States Supreme Court's decision in Robbins v. California, 453 U.S. ___, 101 S.Ct. 2841, ___L.Ed.2d ___(Decided July 1, 1981), Petitioner further contended that

> Justice Powell's concurring opinion in Robbins (101 S.Ct. at 2847-51), coupled with the dissenting opinions of Justice Blackmun (101 S.Ct. at 2851), Justice Rehnquist (101 S.Ct. at 2851-55), and Justice Stevens (101 S.Ct. at 2855-59), and also with the concurring opinion of Chief Justice Burger in Arkansas v. Sanders, 442 U.S. 753, 766-68, 99 S.Ct. 2586, 61 L.Ed.2d 235, 246-48 (1979), suggests that the United States Supreme Court, if presented the issue directly on appeal, would decide that the warrant requirement's "automobile exception" applies to container searches conducted pursuant to a valid, warrantless vehicle search.

Justice Powell in fact stated in his concurring opinion in Robbins:

> Resolving this case by expanding the scope of the automobile exception is attractive not so much for its logical virtue, but because it may provide ground for agreement by a majority of the presently fractured Court on an approach that would give more specific guidance to police and courts in this recurring situation - one that has led to incessant litigation.

101 S.Ct. at 1250 (emphasis added).

However, the Maine Supreme Judicial Court rejected this argument in a two-page memorandum decision (see Appendix A), stating:

> This case falls squarely within the holdings of State v. Blais, Me., 416 A.2d 1253 (1980), and State v. Hassapelis, Me., 404 A.2d 232 (1979), and is controlled thereby. In those decisions we held [relying exclusively on Sanders and Chadwick] that "although the right to seize and search an automobile establishes the right to seize a container found in the vehicle, the right to search the container itself, without a warrant, must be independently established." State v. Blais, supra, at 1257. See also Robbins v. California,

49 U.S.L.W. 4906 (U.S. July 1, 1980) (No. 80-148). On the facts of this case, the State did not show any independent exigent circumstances justifying the warrantless search of the brown paper bag.[1]

---

[1]Although the Supreme Judicial Court did not expressly state that it was deciding a federal Fourth Amendment question, the Maine Court's citations to State v. Blais, Me., 416 A.2d 1253 (1980), State v. Hassapelis, Me., 404 A.2d 232 (1979), and Robbins v. California, supra, confirm that the Court was in fact working with federal law. In State v. Hassapelis, supra, the Maine Court relied on Sanders and Chadwick in finding, as a matter of federal Fourth Amendment law, that the search of a zippered gym bag discovered in defendant's automobile in the course of an otherwise lawful warrantless search of the vehicle was constitutionally invalid. The Hassapelis Court specifically stated:

> In Arkansas v. Sanders, ___ U.S. ___, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), the United States Supreme Court reviewed its decisions in United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), and Chambers v. Maroney, supra, and held that when an auto-

> mobile is validly though warrantlessly stopped and searched, an item of personal luggage found within the automobile may not under normal circumstances be immediately opened and searched even where the police have probable cause to believe that it contains fruits, instrumentalities, or evidence of crime. The Court made clear that in such a case the police may lawfully seize the luggage but must await the issuance of a warrant before opening it. Arkansas v. Sanders, supra at ___, 99 S.Ct. at 2594, 61 L.Ed.2d at 235.
>
> Judged by the Sanders standard, the search of the zippered gym bag found on the floor of the jeepster in the case at bar was unconstitutional, and the contents of the bag should not have been admitted at trial.

State v. Hassapelis, Me., 404 A.2d 232, 237 (1979).

In State v. Blais, Me., 416 A.2d 1253 (1980), the Maine Court relied on Hassapelis, Sanders, and Chadwick in finding, once again as a matter of federal Fourth Amendment law, that the warrantless search of an opaque plastic bag at the police station violated the Fourth Amendment notwithstanding that the bag was discovered earlier in the course of a lawful warrantless search of an automobile trunk. The Blais Court specifically stated:

Both this court, in State v. Hassapelis, Me., 404 A.2d 232, 237 (1979), and the United States Supreme Court, in Arkansas v. Sanders, 442 U.S. 753, 762-65, 99 S.Ct. 2586, 2592-2594 (1979), and United States v. Chadwick, 433 U.S. 1, 13-15, 97 S.Ct. 2476, 2484-2486, 53 L.Ed.2d 538 (1977), have concluded that although the right to seize and search an automobile establishes the right to seize a container found in the vehicle, the right to search the container itself, without a warrant, must be independently established. Consequently, here, the alleged exigency requiring search of the opaque plastic bag "must be assessed at the point immediately before the search" at the police garage, and not when the bag was initially seized on the turnpike. Arkansas v. Sanders, supra at 763, 99 S.Ct. at 2593; United States v. Chadwick, supra at 13, 97 S.Ct. at 2484. In Sanders the Court specifically rejected the argument, advanced by the prosecution in that case, as it is here, that if under Chambers v. Maroney the police can seize the container, they are automatically entitled to search it. 442 U.S. at 765, n.14, 99 S.Ct. at 2594 n.14. Once the container is securely within the control of the police, the mere fact that it was seized in an automobile does

> not by itself establish a greater need or justification for a warrantless search. Id. at 763-64, 99 S.Ct. at 2593. At the time of the later search of the container, no exigent circumstances existed. Requiring the police to obtain judicial approval for the search in no way would have a "likelihood of frustrating the fulfillment of the governmental interest" in investigating and prosecuting crime, see State v. Richards, supra, at 136.

State v. Blais, Me., 416 A.2d 1253, 1257 (1980).

Now, citing Blais, Hassapelis, and the United States Supreme Court's latest application of the Sanders-Chadwick rule in Robbins, the Maine Supreme Judicial Court has ruled in the instant case, as a matter of federal Fourth Amendment law, that the search of the brown paper bag found in Respondent's automobile in the course of the lawful warrantless search of the vehicle itself was invalid under the United States Constitution; hence, the marijuana found in the bag must be suppressed. Significantly, the suppression of the marijuana was not mandated by the Maine Constitution because the Maine Supreme Judicial Court has not adopted an exclusionary rule of its own for the search and seizure provision contained in Article I, §5 of the Maine Constitution. The Maine Court instead accepts the exclusionary rule enunciated by the United States Supreme Court pursuant to the Fourth Amendment of the United States Constitution, which the

United States Supreme Court, relying on the Fourteenth Amendment as authority, has made applicable to the fifty states. State v. Fredette, Me., 411 A.2d 65, 67 (1979); State v. Foisy, Me., 384 A.2d 42, 44 n.2 (1978); State v. Stone, Me., 294 A.2d 683, 693 n.15 (1972); State v. Hawkins, Me., 261 A.2d 255, 258 n.3 (1970).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO U.S.SUP.CT. RULE 17.1(c) BECAUSE THE MAINE SUPREME JUDICIAL COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The issue decided by the Maine Supreme Judicial Court in this case, i.e., whether the automobile exception to the Fourth Amendment's warrant requirement permits the warrantless search of containers discovered incidental to the vehicle search, is an important question of federal law which the United States Supreme Court did not resolve in either Robbins v. California, 453 U.S.___, 101 S.Ct.

2841, ___L.Ed.2d ___(Decided July 1, 1980), or New York v. Belton, ___U.S.___, 101 S.Ct. 2860, ___L.Ed.2d ___(Decided July 1, 1981), or Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). Recognizing both the importance of this issue and that the matter was left unresolved by Robbins, the Supreme Court has already granted certiorari in the D.C. Circuit case of United States v. Ross, No. 80-2209, 30 Crim.L.Rptr. 4029, 4035 (October 14, 1981), which presents the same general question posed by the instant case, namely, whether the warrantless search, based upon probable cause, of a closed but unsealed paper bag found in the trunk of an automobile during the lawful search of the vehicle was permissible under the Fourth Amendment. Indicative of the fact that the plurality opinion in Robbins did not definitively settle this issue, the Supreme Court has also directed the parties in Ross to address the question of whether Robbins v. California,

supra, should be reconsidered. 30 Crim.L. Rptr. 1005, 4029, 4035 (October 14, 1981).

U.S.Sup.Ct. Rule 17.1(c) states that one reason considered by the Supreme Court in deciding to grant a petition for certiorari is:

> [w]hen a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court ....

United States v. Ross, supra, presents the instance wherein a federal court of appeals has decided an important but unsettled question of federal law; hence, certiorari has been granted. The instant Petition should be granted also because it entails a case wherein a state court of last resort, the Maine Supreme Judicial Court, has decided the same federal question presented in Ross.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO U.S.SUP.CT. RULE 17.1(b) BECAUSE THE MAINE SUPREME JUDICIAL COURT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A FEDERAL COURT OF APPEALS.

That the federal Fourth Amendment issue decided by the Maine Supreme Judicial Court has not been settled by the United States Supreme Court is demonstrated by the conflict between the Maine Court's opinion and the decisions of federal circuit courts of appeals which have dealt with the same issue. In United States v. Mannino, 635 F.2d 110 (2d Cir. 1980), the Second Circuit ruled that Sanders and Chadwick did not require suppression of the contents of a white plastic bag found in an automobile and warrantlessly searched in the course of a lawful, warrantless search of the vehicle. The Court found that since the bag and its contents were not protected by an independent expectation of privacy distinct from the interior of the car

itself, the automobile exception to the warrant requirement permitted the search of the bag as well as the car. In United States v. Mackey, 626 F.2d 684 (9th Cir. 1980), the Ninth Circuit reached a similar conclusion and held that, notwithstanding Chadwick and Sanders, the automobile exception authorized the warrantless search of a paper bag discovered in the course of a lawful, warrantless search of Mackey's vehicle. And in United States v. Milhollan, 599 F.2d 518 (3d Cir. 1979), cert. denied, 444 U.S. 909 (1979), the Third Circuit in a pre-Sanders yet post-Chadwick case upheld the warrantless search of Milhollan's sachel discovered in the course of a lawful, warrantless vehicle search. The Third Circuit stated:

> We do not believe, however, that Chadwick controls here, since the Supreme Court itself did not treat that case as one involving an automobile search. The government had not asserted that the footlocker's "brief contact with Chadwick's car" justified the intrusion

under Chambers v. Maroney and its progeny. See 433 U.S. at 11, 97 S.Ct. 2476. Nor did the Court suggest that it was altering in any way the rules governing pure automotive searches. See Rakas v. Illinois, 439 U.S. 128, 148, 152, 99 S.Ct. 421, 433, 435, 58 L.Ed.2d 387 (1978)(Rehnquist, J., for the Court and Powell, J., concurring); United States v. Finnegan, 568 F.2d 637, 640-41 (9th Cir. 1977)(reaffirming United States v. Evans, supra, after Chadwick). Here, the police had probable cause to believe that Milhollan's car, not a particular container in brief contact with Milhollan's car, contained evidence of a crime. Their suspicions were not localized; their search of the automobile was not a pretext for a search of the satchel. They only knew that somewhere in Milhollan's automobile there probably was evidence shedding light on his true identity. These facts bring this case within Chambers and distinguish it from Chadwick.

Milhollan would have the police secure a search warrant permitting them to open closed containers like his satchel. Unfortunately, once the satchel is removed from the context of an automotive search, the police may not have probable cause

> to support a warrant. They had no inkling that the satchel, by itself, contained relevant evidence. They only knew that the car contained evidence and that the satchel was in the car. Permission to search an automobile is hollow indeed if it does not include permission to search its contents and component parts. We see no difference of constitutional magnitude between unwrapping the rag surrounding Alec Foltz's wallet and opening the satchel lying on the back seat.
>
> We hold that this automotive search, justifiable under Chambers v. Maroney and United States v. Vento, legally could include a search of Milhollan's satchel because the satchel's contact with the automobile was more than incidental and because the intrusion into the automobile was not a pretext for a search of the satchel. The district court did not err in refusing to suppress the fruits of that search.

599 F.2d at 527.

In the instant case, however, the Maine Supreme Judicial Court cited Blais, Hassapelis, and Robbins, and thereby im-

plicitly relied on Sanders and Chadwick, in reaching a contrary result. U.S.Sup. Ct. Rule 17.1(b) states that one factor considered by the Supreme Court in deciding to grant a petition for certiorari is:

> [w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

The instant Petition should be granted because it entails a case where this factor is present, largely because the federal Fourth Amendment question involved here has not been settled by the Supreme Court.

III. THE MAINE SUPREME JUDICIAL COURT ERRED IN DECIDING THAT THE AUTOMOBILE EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT DID NOT PERMIT THE WARRANTLESS SEARCH OF THE BROWN PAPER BAG INCIDENTAL TO THE LAWFUL, WARRANTLESS SEARCH OF RESPONDENT'S AUTOMOBILE.

Petitioner is applying for certiorari in the instant case because the Maine Supreme

Judicial Court erred by interpreting Sanders and Chadwick to hold that the automobile exception to the Fourth Amendment's warrant requirement did not permit the warrantless search of the brown paper bag incidental to the lawful, warrantless search of Respondent's automobile. For Sanders and Chadwick did not address the issue of whether police must secure a warrant to search a container seized pursuant to a legitimate, warrantless automobile search because neither Sanders nor Chadwick involved automobile searches per se. In both cases a particular container distinct and separate from the car, not the entire car itself, was the focus of the police officers' search. Hence, neither case presented for resolution the issue now raised in the instant case wherein police suspicions were not localized to a particular container and yet there was probable cause that somewhere in Respondent's automobile was marijuana.[2]

---

[2]Petitioner has not attempted to justify the warrantless search of the brown paper bag,

That the automobile exception to the Fourth Amendment's warrant requirement permits the warrantless search of the brown paper bag conducted here was contemplated by the United States Supreme Court in its initial formulation of the automobile exception in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). In Carroll, the Supreme Court stated that "[t]he 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." 267 U.S. at 149, 69 L.Ed. at 549. The Court then analyzed a

found in the passenger compartment of Respondent's automobile, on grounds of the "search incident to arrest" rule set forth in New York v. Belton, 101 S.Ct. 2860 (1981), because the "Agreed Statement of Facts" (Appendix B) does not disclose whether Respondent at the time of the search was under the "lawful custodial arrest" required by Belton, 101 S.Ct. at 2864, to justify a contemporaneous, warrantless search of the passenger compartment and any containers located therein.

number of Congressional statutes from the years 1789 to 1834, and also from 1899 and 1917,

> to show that the guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods. where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

267 U.S. at 153, 69 L.Ed. at 551. Several of the statutes analyzed by the Carroll Court specifically permitted law enforcement officials to extend their warrantless search for contraband goods into "packages" and "places of deposit" as well as the vehicles which might be carrying them,[3] indicating (1) that in the

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[3]Act of May 6, 1822, ch. 58, §2, 3 Stat. at L. 682; Act of June 30, 1834, ch. 161, §20, 4 Stat. at L. 729, 732; Carroll v. United States, supra, 267 U.S. at 152, 69 L.Ed. at 551.

early history of the federal government it was not deemed unreasonable to extend the lawful, warrantless search of a movable vehicle into any containers located therein and (2) that the Carroll Court itself, accepting without comment the early federal statutes' authorization of warrantless searches of packages and places of deposits, did not see a Fourth Amendment violation in the warrantless search of a container found in a movable vehicle which is itself legally subject to a warrantless search.

Most importantly, the Supreme Court in Carroll, following the lead of Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), paid particular attention to search and seizure statutes passed by the first Congress, the same Congress which proposed and passed the Fourth Amendment, reasoning that any warrantless searches authorized by this Congress were not and should not be deemed the kind of "unreasonable searches" which Congress intended to prohibit

when proposing and passing the Fourth Amendment. Carroll v. United States, supra, 267 U.S. at 150, 69 L.Ed. at 550 (quoting Boyd v. United States, supra, 116 U.S. at 623). In this regard, the Carroll Court found noteworthy the 24th Section of the Act of July 31, 1789, ch. 5, 1 Stat. at L. 29, 43, which provided:

> That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and

> merchandise, on which the duties shall not have been paid or secured, shall be forfeited.

After noting that Congress passed similar provisions in 1790, 1793, and 1799, the Carroll Court stated:

> Thus, contemporaneously with the adoption of the 4th Amendment, we find in the first Congress, and in the following second and fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel, where they readily could be put out of reach of a search warrant.

267 U.S. at 151, 69 L.Ed. at 550.

Significantly, in the 23rd Section of the Act of July 31, 1789, which immediately precedes the 24th Section quoted above, Congress authorized customs officers to open and examine "packages" as follows:

> That it shall be lawful for the collector, or other officer of the customs, after entry made of any goods, wares or merchan-

> dise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof, and if upon such examination they shall be found to agree with the entries, the officer making such seizure shall cause the same to be re-packed, and delivered to the owner or claimant forthwith, and the expense of such examination shall be paid by the collector, and allowed in the settlement of his accounts; but if any of the packages so examined be found to differ in their contents from the entry, and it shall appear that such difference hath been made with intention to defraud the revenue, then all the goods, wares or merchandise contained in such package or packages, shall be forfeited: Provided always, That if the owner or consignee of such goods as shall not be accompanied with the original invoice, should choose to wait the receipt of the invoice, in such case, the collector shall take into his possession all such goods, wares and merchandise, and store the same, at the expense and risk of the owner or consignee, until the invoice shall arrive, or until they agree to have the same valued.

Act of July 31, 1789, ch. 5, §23, 1 Stat. at L. 29, 43. Reading the 24th Section in

the context of this 23rd Section and the remainder of the Act of July 31, 1789, it cannot be doubted that (1) when goods, wares, or merchandise subject to duty were concealed they were often concealed in packages or containers and (2) the 24th Section's authorization of warrantless searches of ships and vessels for concealed goods, wares, or merchandise subject to duty also permitted the warrantless search of any packages found on board which might contain the sought-after items. It is ludicrous to think that the first Congress, in passing the 24th Section, intended that customs officers could warrantlessly search every nook and cranny of a ship for concealed goods but yet, if they came across an opaque package - the place where the goods were most likely to be hidden, had to keep it tightly closed until receiving a magistrate's permission to peek inside. See generally 2 W. LaFave, Search and Seizure, §7.2, p.78 (1981 Pocket Part).

The Carroll Court expressly stated that "[t]he 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted ...." 267 U.S. at 149, 69 L.Ed. at 549. After examining the Act of July 31, 1789, and other early federal statutes, the Carroll Court found that the Fourth Amendment did not at the time of its adoption prohibit the warrantless search of a vehicle for contraband goods and therefore does not contain such a prohibition now. As illustrated by the Act of July 31, 1789, a warrantless search of a container pursuant to a lawful warrantless search of a movable vessel was also not unreasonable at the time that the Fourth Amendment was adopted; therefore such a search should not now be prohibited by the Fourth Amendment. Hence, the warrantless search of the brown paper bag incident to the lawful warrantless search of Respondent's automobile should not be deemed unreasonable, and the Maine Superior Court Justice should

not have suppressed the marijuana found inside the bag.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Dated: December 4, 1981

Respectfully submitted,

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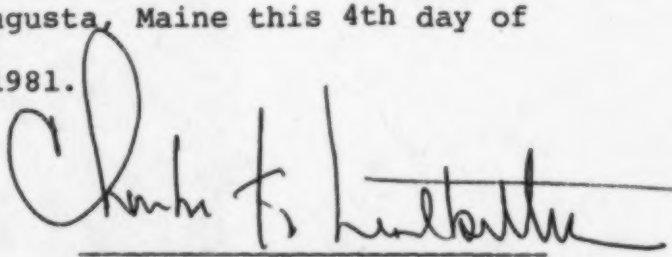
CERTIFICATE OF SERVICE

I, CHARLES K. LEADBETTER, Assistant Attorney General, hereby certify that I have caused three (3) copies of the foregoing "Petition for a Writ of Certiorari" to be

served upon Richard Langley, Esquire, Respondent's Attorney of Record, by depositing them in the United States Mail, postage prepaid, addressed as follows:

RICHARD LANGLEY, ESQUIRE
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Dated at Augusta, Maine this 4th day of December, 1981.



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Appendix

APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 2764
Law Docket No. Law-81-166

STATE OF MAINE

v.

MICHAEL A. PATTEN

Argued: September 23, 1981
Decided: October 30, 1981

Before McKUSICK, C.J., and GODFREY, NICHOLS, ROBERTS, CARTER, and WATHEN, JJ.

MEMORANDUM OF DECISION

The State appeals from a Superior Court order suppressing evidence seized by the State without a warrant. On an informant's tip, the Aroostook County Sheriff's Department seized a car driven by appellant Michael Patten, whom they believed to be transporting marijuana. The officers seized and searched a closed brown paper bag they discovered on the back seat; inside the bag, they discovered marijuana. At the suppression hearing, the presiding justice found that the warrantless

stop, seizure, and search of Patten's automobile and the seizure of the brown paper bag were valid, but he found that the subsequent search of the bag was not valid without a warrant. The State contends that the automobile exception to the fourth amendment requirement of a warrant justified the search of the bag. We disagree.

This case falls squarely within the holdings of State v. Blais, Me., 416 A.2d 1253 (1980), and State v. Hassapelis, Me., 404 A.2d 232 (1979), and is controlled thereby. In those decisions we held that "although the right to seize and search an automobile establishes the right to seize a container found in the vehicle, the right to search the container itself, without a warrant, must be independently established." State v. Blais, supra, at 1257. See also Robbins v. California, 49 U.S.L.W. 4906 (U.S. July 1, 1980) (No. 80-148). On the facts of this case, the State did not show any independent

exigent circumstances justifying the warrantless search of the brown paper bag.

The entry is:

Judgment affirmed.

All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

APPENDIX B

Date filed: September 18, 1980

STATE OF MAINE — SUPERIOR COURT

AROOSTOOK, ss. — Criminal Action
Docket No. CR-79-734

STATE OF MAINE,
Plaintiff

vs.

MICHAEL A. PATTEN,
Defendant

AGREED STATEMENT OF FACTS

Now come the parties and submit the following Agreed Statement of Facts for the purpose of this Court's deciding Defendant's Motion to Suppress certain items of Defendant's property seized in a search of Defendant's car, a 1978 Dodge Magnum, cream in color, Vehicle Identification Number XS22G8R228858, Registration Number 220-002, in Mars Hill, Maine.

1. On Friday, November 27, 1979, at approximately 8:00 o'clock p.m. Deputy Carl McHatten of the Aroostook County Sheriff's Department received a phone call from a con-

fidential informant.

2. The informant identified himself and told Deputy McHatten that while working with Michael Patten at Loring Air Force Base the Defendant stated that he would be getting done work at about 10:30 p.m., that he would then go home to get some rest and that in the morning he would be leaving to go to Bangor to procure marijuana.

3. The confidential informant has on at least four (4) prior occasions provided information to Deputy McHatten which proved to be reliable.

4. Deputy McHatten observed Michael Patten arrive at his residence at 22 School Street in Limestone, Maine, at approximately 10:35 p.m. on November 27, 1979, in the previously described Dodge automobile.

5. McHatten continued surveilance[sic] of the Patten residence until 12:00 midnight at which time Mr. Patten apparently had not left the residence.

6. At 6:00 a.m., November 28, 1979, Deputy McHatten resumed surveillance of Defendant's residence and at 8:15 a.m. observed the Defendant and another person get into the Defendant's car and leave Limestone headed south on Route 165.

7. Deputy McHatten then contacted the Aroostook County Sheriff's Department and asked that someone watch for the Patten vehicle at some point south of Limestone.

8. At approximately 9:30 a.m. the Defendant's car was observed in Monticello by Deputy Keith Wheeler headed south on Route 1.

9. Deputy McHatten then contacted the Aroostook County Sheriff's Department and made arrangements with Sargent[sic] Edgar Wheeler to have surveilance[sic] set up in the Houlton area.

10. Deputy McHatten advised Sargent[sic] Wheeler that if the Defendant did go to the Bangor area that McHatten expected that he would be returning to the Houlton area between 2:00 p.m. and 3:00 p.m. that day.

11. At approximately 1:00 p.m. that day McHatten and Chief Johndro of the Limestone Police Department left Limestone to go to the Houlton area to assist on surveilance [sic].

12. At approximately 2:50 p.m. Deputy Keith Wheeler again observed the Defendant's car proceeding north on U.S. Route 1 in Monticello.

13. The distance between Bangor and Monticello is approximately 125 miles one way and the round trip from Monticello to Bangor and back to Monticello could be accomplished in approximately five (5) hours.

14. Approximately five (5) hours and twenty (20) minutes had lapsed between the time Deputy Keith Wheeler first observed the Patten vehicle heading south on U.S. Route 1 in Monticello and the time he observed the Patten vehicle proceeding north on U.S. Route 1 in Monticello.

15. When advised by Deputy Keith Wheeler that he had spotted the Patten vehicle in

Monticello, Deputy McHatten requested that Deputy Wheeler attempt to keep the vehicle in view and Deputy McHatten and Chief Johndro proceeded north from Houlton.

16. At approximately 3:00 p.m. Deputy McHatten was advised by Deputy Keith Wheeler that the Patten vehicle had pulled into the Smith Truck Stop in Blaine and then back on to U.S. Route 1 without stopping. At that point Deputy Keith Wheeler felt that the occupants of the Patten vehicle may have observed him following them and that Patten may attempt to lose him.

17. At that point Deputy McHatten advised Deputy Wheeler to obtain assistance from Deputy Hugh Turner in Mars Hill in assisting Wheeler in stopping the vehicle and also advised Wheeler that he should stop and hold the Patten vehicle until McHatten arrived.

18. In Mars Hill the Patten vehicle turned off U.S. Route 1 and was driven to an area behind the Exxon service station in Mars Hill, an area obscured from the view of

persons travelling along U.S. Route 1 and an area where commerce does not take place under normal circumstances.

19. At approximately 3:05 p.m., Deputy Wheeler and Deputy Turner drove along side the Patten vehicle for the purpose of detaining the vehicle as instructed by McHatten.

20. Deputy Wheeler and Deputy Turner approached the Defendant's vehicle and determined that Michael Patten was in fact the operator of the vehicle and that Michael Bell of Limestone was a passenger in the previously described Dodge vehicle.

21. At approximately 3:08 p.m., Deputy McHatten and Chief Johndro arrived at the scene.

22. Deputy McHatten showed Michael Patten identification and advised Patten that there was reason to believe that Patten had drugs in his vehicle.

23. McHatten asked Patten if he could search Patten's vehicle and Patten refused.

24. McHatten then advised Patten that due to the circumstances McHatten had reason to search the car and intended to do so.

25. McHatten then proceeded to search the Patten vehicle. McHatten observed in the back seat area of the right side of the car a jacket partically[sic] covering a brown paper bag. Deputy Turner removed the jacket and opened the brown paper bag.

26. McHatten looked inside the brown paper bag and observed a plastic bag filled with plant material packaged in several smaller plastic bags, which material McHatten believed to be marijuana.

27. McHatten look[sic] possession of the brown paper bag and its contents and the trunk of the Patten vehicle was searched by Deputy Keith Wheeler and Deputy John York.

28. McHatten and Chief Johndro then took Michael Patten to the Mars Hill Sheriff's Department office where he was advised of his rights and formally advised that he was under arrest.

Dated: May 7, 1980

s/ Richard A. Langley
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CLERK OF COURTS OFFICE
FILED
Sep 18 1980

CLERK OF AROOSTOOK COUNTY

APPENDIX C

Date filed: April 7, 1981

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
Criminal Action,
Docket No. CR-79-734

STATE OF MAINE)
)
v.) FINDINGS and ORDER
)
MICHAEL PATTEN)

Hearing was held on Defendant's motion to suppress marijuana obtained by the State following a seizure of Defendant's car and a search of a closed brown paper bag found on the back seat of the car during a search of the car. The issue was presented to the Court upon an Agreed Statement of Facts, dated May 7, 1980. Final briefs were filed March 26, 1981.

The issues presented here are twofold:

(1) Whether the police officers, on November 28, 1979, had probable cause to seize Defendant's car in Mars Hill at the Exxon service station without a search warrant.

(2) Whether the police officers, at the time and place stated in the preceeding paragraph, had the right to search the brown paper bag found on the back seat of the car without a search warrant.

CONCLUSIONS OF LAW

1. It is well settled under the Fourth and Fourteenth Amendments to the United States Constitution that a seizure and search conducted without a warrant issued upon probable cause by an impartial magistrate is per se unreasonable and unlawful, subject only to a few specifically established and well delineated exceptions.

The burden is initially upon the Defendant to show a warrantless search. Once this burden has been met, the burden shifts to the State to justify, by a preponderance of the evidence, the lawfulness of the search and seizure. In this case the State has the burden as aforestated, of proving the lawfulness of the seizure of Defendant's car and of the search of the brown paper bag.

It must prove that the seizure and search fall within one of the exceptions excusing the State from securing a search warrant.

2. The Court first takes up the seizure of Defendant's car in back of the Exxon service station in Mars Hill. Defendant concedes, and the Court finds as fact, that at that time and place, the police officers had probable cause to stop Defendant's car. They had probable cause to believe that Defendant had and was committing the criminal offense of trafficking in a scheduled drug and that evidence in the nature of a substantial amount of marijuana would be found in his car. Defendant contends, however, that the stop and seizure of Defendant and his car was unlawful because it was made without a search warrant and that no exigent circumstances (a recognized exception to the requirement of a search warrant) existed excusing the requisite search warrant.

The Court disagrees. It is possible that probable cause existed at the time

police officers noticed the Defendant driving south on Rt. 1 in Monticello at 9:30 a.m. on November 28, 1979. The State was entitled to gather further evidence to better substantiate its case on probable cause before seeking a search warrant. Clearly, it had a much stronger case of probable cause when the police officers observed Defendant returning north at about 2:50 p.m. in Monticello; with an elapsed time of about five hours since observed going south, a period reasonably calculated as having allowed Defendant to travel to Bangor (where the informer had told officer McHatten Defendant was going to pick up the drugs) and return. The officers then undertook a cautious northward pursuit of the Defendant. The officers then became alerted by Defendant's manner of driving, that he appeared suspicious of being followed. They thereupon decided to stop the Defendant. Defendant confirmed their suspicion by pulling off the highway in Mars Hill and driving to an area behind

the Exxon service station obscured from travellers on the highway and from the general business conducted at the service station. At this point pursuing officers Wheeler and Turner pulled alongside the car for the purpose of detaining the vehicle. They determined that Defendant was the operator of the car and had a passenger with him. They detained Defendant and his car for several minutes at which time officer McHatten arrived. McHatten identified himself, informed Defendant they had reason to believe he had drugs in his car and requested permission to search the car, which Defendant denied.

The Court finds that these facts presented exigent circumstances excusing the State from securing a search warrant to seize the car and anything therein reasonably calculated to contain drugs. The officers had no opportunity to obtain a search warrant after obtaining clear probable cause to believe Defendant was hauling contraband

drugs in his car. They were not then required to allow Defendant to continue on when they concluded he suspected being followed and might try to evade them. The very mobility of the car fully warranted the officers stopping him at first opportunity. To have done otherwise could well have resulted in Defendant effecting a getaway with resulting loss of evidence..

It is determined that the seizure of Defendant's car was lawful and not violative of his constitutional rights.

3. The Court must now consider the lawfulness of the search of the brown paper bag.

Following Defendant's refusal to allow a search of his car, Officer McHatten proceeded to search the car. He observed on the back seat of the car a jacket partially covering a brown paper bag. The paper bag was rolled closed at the top. It had to be opened before its contents could be observed. Officer Turner opened the paper bag. Officer McHatten looked inside the bag and observed a clear

plastic bag containing several smaller plastic bags filled with a substance Officer McHatten concluded was marijuana. Thereupon, Officer McHatten took possession of the bag and its contents. The Defendant was thereupon taken to the Mars Hill Police Department and placed under arrest.

The State has variously sought to justify the warrantless search of the paper bag by arguing that

(1) it was an automobile search within the meaning of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970);

(2) exigent circumstances existed;

(3) Defendant had no reasonable expectancy of privacy in the contents of the car. Notwithstanding the State's very well prepared and persuasive argument in its Brief, the Court concludes that the search of the paper bag was unlawful and violative of the Defendant's Fourth and Fourteenth Amendment rights from unlawful search and seizure.

4. The Court finds that the State had probable cause to seize the bag. It also had probable cause to make an immediate search of the car at the place where it was stopped under the "automobile exception" rule. Chambers v. Maroney, supra, State v. Morton, Me. 397 A.2d 171 (1979). It also had probable cause to seize the paper bag.

5. The search of the paper bag was not a search permitted under the automobile exception. Chambers v. Maroney, supra. A closed paper bag lying on the back seat of a car is not a part of the car. Our Law Court, in the case of State v. Blais, Me., 416 A.2d 1253, 1257 (1980) stated:

> Both this court, in State v. Hassapelis, Me., 404 A.2d 232, 237 (1979), and the United States Supreme Court, in Arkansas v. Sanders, 442 U.S. 753, 762-65, 99 S.Ct. 2586, 2593-2594 (1979), and United States v. Chadwick, 433 U.S. 1, 13-15, 97 S.Ct. 2476, 2484-2486, 53 L.Ed.2d 538 (1977,[sic] have concluded that although the right to seize and search an automobile establishes the

right to seize a container found in the vehicle, the right to search the container itself, without a warrant, must be independently established. Consequently, here, the alleged exigency requiring search of the opaque plastic bag "must be assessed at the point immediately before the search" at the police garage, and not when the bag was initially seized on the turnpike. Arkansas v. Sanders, supra at 763, 99 S.Ct. at 2593; United States v. Chadwick, supra at 13, 97 S.Ct. at 2484. In Sanders the Court specifically rejected the argument, advanced by the prosecution in that case, as it is here, that if under Chambers v. Maroney the police can seize the container, they are automatically entitled to search it. 442 U.S. at 765 n.14, 99 S.Ct. at 2594 n.14. Once the container is securely within the control of the police, the mere fact that it was seized in an automobile does not by itself establish a greater need or justification for a warrantless search. Id. at 763-64, 99 S.Ct. at 2593. At the time of the later search of the container, no exigent circumstances existed. Requiring the police to obtain judicial approval of the search in no way would have a "likelihood of frustrating the fulfillment of the governmental interest" in investigating and prosecuting crime, see State v. Richards, supra, at 136.

6. The State has not introduced evidence to show that exigent circumstances existed at the time the police officers found and took the bag from the rear seat of Defendant's car justifying an "on the scene search" of the bag. No showing has been made that when they seized the paper bag, any circumstances existed jeopardizing their continued control of the paper bag or its contents. State v. Blais, (supra).

7. The Court finds that the Defendant had a reasonable expectancy of privacy in the contents of the brown paper bag. It was rolled up, so that no one could see its contents unless unrolled and opened. I again quote our Law Court in State v. Blais (supra) where the Court suppressed the fruits of a warrantless search of an opaque garbage bag, rolled up, so its contents were not visible, found in Defendant's car trunk:

> The State's second argument is that there was no need for a search warrant because Defendants had no reasonable expectation of privacy in the contents

> of the bag. However, the bag, even though taken from an automobile, is protected exactly as much as a similar container taken from a home and is subject to being searched without a warrant only if its contents are in plain view or if the nature of the container is such that its contents are equivalent to being in plain view. See Arkansas v. Sanders, supra at 764 n.13, 99 S.Ct. at 2593 n.13 (contents of burglar tools kit or gun case can be inferred from its outward appearance; therefore, there is no reasonable expectation of privacy). Holding that an unlocked suitcase deserves the full protection of the Fourth Amendment, the Court in Sanders went further than it had in Chadwick, which involved a double-locked, 200 pound footlocker; the Court found the differences in size and locking not to be material. Arkansas v. Sanders, supra at 762 n.9, 99 S.Ct. at 2592 n.9.
>
> (6) In the case at bar, Defendants took the precaution of placing their property in an opaque bag of a type that does not by its nature display its contents, and of rolling up the bag so that its contents were not visible to anyone searching the trunk of their car.

I do not find the instant case distinguishable from State v. Blais, (supra). I

find no significant difference between a closed opague[sic] garbage bag in a car trunk (Blais) and a closed paper bag on the back seat of a car, as in this case.

In summary, I find that the State has not proven by a preponderance of the evidence that its search of the brown paper bag, without first obtaining a search warrant, was a permissible exception to the constitutional requirement of obtaining a search warrant before searching the bag.

It is accordingly DECREED AND ORDERED that:

1. The motion to suppress is granted.

2. The product of the search of the brown paper bag is suppressed and declared inadmissible at any trial or proceeding against the Defendant.

Date: March 31, 1981.

s/ Elmer H. Violette
Elmer H. Violette
Justice, Superior Court

CLERK OF COURTS OFFICE
FILED
Apr 7 1981
Clerk of Aroostook County

Opposition

ORIGINAL

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SUPREME COURT, U.S.

81-1089

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MAINE,
Petitioner

V.

MICHAEL A. PATTEN,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICAL COURT OF THE
STATE OF MAINE

RESPONDENT'S REPLY TO PETITIONERS PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE AUTOMOBILE EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT PERMITTED THE WARRANTLESS SEARCH OF THE BROWN PAPER BAG FOUND IN THE RESPONDENT'S AUTOMOBILE IN THE COURSE OF THE LAWFUL, WARRANTLESS SEARCH OF THE VEHICLE ITSELF.

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III. THE MAINE SUPREME JUDICIAL COURT DID NOT ERR IN DECIDING THAT THE AUTOMOBILE EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT DID NOT PERMIT THE WARRANTLESS SEARCH OF THE BROWN PAPER BAG INCIDENTAL TO THE LAWFUL, WARRANTLESS SEARCH OF RESPONDENT'S AUTOMOBILE.	6
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OPINION BELOW

Respondent adopts Petitioner's statement regarding the opinion below.

JURISDICTION

Respondent adopts Petitioner's statement regarding jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS

Respondent adopts Petitioner's statement of the pertinent Constitutional provision.

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED PURSUANT TO U. S. SUP. CT. RULE 17.1 (c) BECAUSE THE QUESTION OF LAW INVOLVED HAS BEEN SETTLED BY THIS COURT.

The single pertinent issue raised by this case is whether a warrantless search of a container discovered in the course of a valid and permissable vehicle search is permitted under the "automobile exception" to the Fourth Amendment warrant requirement. That question was dealt with specifically by this Court in Arkansas v. Sanders, 442 U. S. 753, 99 S.Ct. 2586, 61L.Ed.2d 235 (1979). In that case this Court characterized the issue before it as being "whether the warrantless search of respondent's suitcase falls on the Chadwick or Chambers/Carroll side of the Fourth Amendment line." Id. at 756, 99 S.Ct. at 2589, L.Ed.2d at 238. Since the Chambers/Carroll "side of the line" stands for the proposition that warrantless searches of automobiles and their contents are constitutionally permissable pursuant to the "automobile exception" to the Fourth Amendment warrant requirement, it seems clear that the majority in Sanders felt that the issue to be decided was whether or not the warrantless search of Sanders' green suitcase was constitutionally permissable by virtue of the "automobile exception" to the warrant requirement. The Court concluded that it was not permissable:

> We . . . find no justification for the extension of Carroll and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.
>
> In sum, we hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations. Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway.

Id. at 761, 99 S.Ct. at 2594, L.Ed. 2d at 243.

Again in Robbins v. California, 453 U.S. _____, 101 S.Ct. 2841, _____L.Ed. 2d ____ (1981) this Court held that contraband discovered in a closed, opaque container during a lawful search "may not be opened without a warrant, even if it is found during the course of a lawful search of an automobile. Id. at ____, S.Ct. at 2847, L.Ed. 2d at _____.

Thus in both Sanders and Robbins, the former involving a "focused" probable cause and the latter a random search, the Court rejected both searches as unjustifiable under the "automobile exception" to the warrant requirement. Accordingly, the issue raised in the present case has been definitely decided by this Court.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED PURSUANT TO U. S. SUP. CT. RULE 17.1 (b) BECAUSE ANY CONFLICT BETWEEN THE DECISION OF THE MAINE SUPREME JUDICIAL COURT IN THIS MATTER AND FEDERAL COURTS OF APPEALS IN OTHER CASES HAS BEEN RESOLVED BY THIS COURTS' MORE RECENT DECISION IN ROBBINS v. CALIFORNIA.

Petitioner cites United States v. Mannino, 635 F.2d 110 (2d Cir. 1980), United States v. Milhollan, 599 F.2d 518 (3d Cir. 1979) and United States v. Mackey, 626 F.2d 684 (9th Cir. 1980) as examples of conflict between Federal Appellate Courts and the Maine Supreme Judicial Court on the question of container searches pursuant to a valid, warrantless automobile search. Respondent submits that any conflict that may have existed between those decisions and the decision of the Maine Supreme Judicial Court in the instant case has been resolved by this Court's more recent decisions in Sanders and Robbins. In Milhollan, a case decided prior to Sanders and Robbins, the decision was premised largely upon the fact that the probable cause of the arresting officers was "not localized" in that they did not have a particular container as the object of their suspicions. The distinction the Petitioner attempts to draw between "particularized" probable cause and general probable cause to search a vehicle appears to have been, at least by inference, dealt with by this Court in Robbins. The search of containers in that case was spontaneous in that probable cause arose only when the arresting officer observed the vehicle in question operating erratically and subsequently smelled marijuana smoke in the drivers compartment. Thus the Milhollan rationale asserted by Petitioner in the instant case both as a conflict between a Federal Appellate Court and the Maine Supreme Judicial Court and as a basis for sustaining the search in the instant case has been implicitly rejected by this Court. In neither Robbins nor the instant case had the arresting officers suspicions zeroed in on any particular container. In that sense, there is no difference in the factual situation of Robbins and of the instant case and there-

fore the Petitioner's "localization" of probable cause argument is without merit.

Because of the foregoing, Petitioner's Writ of Certiorari should not be granted because this case does not entail an issue or issues in conflict with the decisions of other state courts of last resort or of a Federal Court of Appeals because the matter has been resolved by this Court's decisions in Robbins and Sanders.

III. THE MAINE SUPREME JUDICIAL COURT DID NOT ERR IN DECIDING THAT THE AUTOMOBILE EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT DID NOT PERMIT THE WARRANTLESS SEARCH OF THE BROWN PAPER BAG INCIDENTAL TO THE LAWFUL, WARRANTLESS SEARCH OF RESPONDENT'S AUTOMOBILE.

Petitioner alleges that the Maine Supreme Judicial Court erred in its interpretation of this Court decisions in Sanders and Chadwick. The State argues that neither Sanders nor Chadwick dealt with automobile searches per se because, in both cases, the probable cause or focus of the arresting officers search had been "localized." Because in the instant case the focus of the police officers search had not been localized, the Petitioner asserts that a different question is presented for decision.

The Respondent would concede that the focus of the searches in both Chadwick and Sanders were narrowed to particular containers. However, the "localization" rationale was implicitly rejected by this Court in Robbins in which case the object of the police officers search was random and spontaneous rather than specific and "localized." Indeed, the State, in framing the issue to be resolved here, characterizes both Sanders and Chadwick as not presenting "for resolution the issue now raised in the instant case wherein police suspicions were not localized to a particular container and yet there was probable cause that somewhere in Respondent's automobile was marijuana."[1] As stated above, the "localization" rationale of Milhollan was implicitly rejected by the plurality in Robbins.

Although ignoring Robbins, the Petitioner asserts that Sanders was not addressing the issue presented in the instant case and analyzes Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) at length in support of its argument. As stated above, the majority in Sanders made it clear that the decision at hand was

[1]See Petitioner's Writ P.21.

whether or not the warrantless search of Sanders' suitcase fell "on the Chadwick or the Chambers/Carroll side of the Fourth Amendment line." Arkansas v. Sanders, supra at ____, 442, U.S. at 756, 99 S.Ct. at 2589, L.Ed. 2d at 238. The Court concluded that the search fell on the Chadwick side and was constitutionally impermissable.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should not be granted.

Dated: April 20, 1982

Respectfully submitted,

Richard A. Langley

Richard A. Langley, Esq.
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Fort Fairfield, ME 04742

CERTIFICATE OF SERVICE

I, Richard A. Langley, hereby certify that I have caused three (3) copies of the foregoing "Respondent's reply to Petitioner's petition for a Writ of Certiorari" to be served upon Charles K. Leadbetter, Assistant Attorney General, Petitioner's Attorney of Record, by depositing them in the United States Mail, postage prepaid, addressed as follows:

Charles K. Leadbetter
Assistant Attorney General
Criminal Division
Appellate Section
State House Station #6
Augusta, Maine 04333

Dated at Fort Fairfield, Maine this twentieth day of April, 1982.

Richard A. Langley

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81-1089

SUPREME COURT OF THE UNITED STATES

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No. _____

ORIGINAL

STATE OF MAINE
PETITIONER

vs.

MICHAEL A. PATTEN
RESPONDENT

MOTION TO PROCEED IN FORMA PAUPERIS AND APPOINTMENT OF COUNSEL

On December 11, 1981 Petitioner filed with this Honorable Court a Petition for Writ of Certiorari to review an order of the Supreme Judicial Court in the State of Maine dated October 30, 1981.

Respondent has been ordered by this Court to file a reply to Petitioner's petition for Writ of Certiorari.

Respondent, Michael A. Patten moves this Court for an order:

1. Granting Respondent leave to proceed in forma pauperis.

2. Appointing counsel to represent Respondent.

This Motion is based on the Affidavit of Respondent, hereto attached.

Dated at Fort Fairfield, Maine this 21st day of April, 1982.

Richard A. Langley

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RICHARD A. LANGLEY

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472-3321

April 21, 1982

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Supreme Court of the United States
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Washington, D.C. 20543

Attention Robert Kuhn

Re: Maine vs. Michael A. Patten (81-1089)

Dear Mr. Kuhn:

I'm enclosing herewith the original copy of Respondent's reply to the State of Maine's petition for a Writ of Certiorari in the above captioned matter. I'm also enclosing my Motion to Proceed In Forma Pauperis, etc. and hope to have the necessary affidavit executed by Mr. Patten in the very near furture. As soon as I can accomplish that, I'll forward it to you as well.

Thank you very much for your cooperation in this matter.

Very truly yours,

SAGE, AYOOB AND LANGLEY

DickR

Richard A. Langley

RAL:taf

Enclosures